

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHIRLEY GEE O/BO/O S.G., a minor child

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. CV-08-3022-JPH

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
FURTHER PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 20, 2008. (Ct. Rec 12, 17, 19.) Attorney D. James Tree represents plaintiff; Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for further proceedings.

JURISDICTION

On May 3, 2004, plaintiff Shirley Gee, on behalf of S.G., a minor child (plaintiff) protectively filed for Supplemental Security Income (SSI) and alleged an onset date of April 21, 2004. (Tr. 57.) Benefits were denied initially and on reconsideration. (Tr. 516, 521.) A hearing was held before ALJ Peter Baum on October 18, 2006. (Tr. 467-89) Plaintiff's counsel was present and plaintiff's mother testified. (Tr. 467-88.) On February 20, 2007, the ALJ issued a decision finding that plaintiff was not disabled. (Tr. 18-29.) The Appeals Council made additional evidence part of the record and denied

review on February 8, 2008. (Tr. 5, 9.) Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on February 28, 2008. (Ct. Rec. 1.)

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcripts, the ALJ's decision, and the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

Plaintiff was almost nine years old at the time of the hearing. (Tr. 21.) She was living with her mother and two siblings. (Tr. 417-72.) She was in the second grade and spent half of her school time in special education and half in a regular classroom. (Tr. 474.) Plaintiff gets extra help with math and reading. (Tr. 474.) Plaintiff has problems with encopresis and bladder control. (Tr. 475.) She has frequent urinary tract infections. (Tr. 475, 480.) Plaintiff's mother testified that her problems had gotten worse in the year preceding the hearing. (Tr. 475.) Plaintiff's mother also testified that plaintiff has involuntary muscle spasms from the encopresis and urinary tract infections. (Tr. 481.)

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877

1 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

2 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402
 3 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its
 4 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 5 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the
 6 proper legal standards were not applied in weighing the evidence and making the decision. *Browner v.*
 7 *Sec’y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
 8 evidence to support the administrative findings, or if there is conflicting evidence that will support a
 9 finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v.*
 10 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

11 SEQUENTIAL PROCESS

12 On August 22, 1996, Congress passed the Personal Responsibility and Work Opportunity
 13 Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 105 which amended 42 U.S.C. § 1382c(a)(3).
 14 Under this law, a child under the age of eighteen is considered disabled for the purposes of SSI benefits
 15 if “that individual has a medically determinable physical or mental impairment, which results in marked
 16 and severe functional limitations, and which can be expected to result in death or which has lasted or can
 17 be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §
 18 1382(c)(3)(C)(i)(2003).

19 The regulations provide a three-step process to determine whether a child is disabled. First, the
 20 ALJ must determine whether the child is engaged in substantial gainful activity. 20 C.F.R. § 416.924(b).
 21 If the child is not engaged in substantial gainful activity, the analysis proceeds to step two. Step two
 22 requires the ALJ to determine whether the child’s impairment or combination of impairments is severe.
 23 20 C.F.R. § 416.924(c). The child will not be found to have a severe impairment if it constitutes a “slight
 24 abnormality or combination of slight abnormalities that cause no more than minimal functional
 25 limitations.” *Id.* If, however, there is a finding of severe impairment, the analysis proceeds to the final
 26 step, which requires the ALJ to determine whether the impairment or combination of impairments “meet,
 27 medically equal or functionally equal” the severity of a set of criteria for an impairment in the listings.
 28 20 C.F.R. § 416.924(d).

1 The regulations provide that an impairment will be found to be functionally equivalent to a listed
2 impairment if it results in extreme limitations in one area of functioning or marked limitations in two
3 areas of functioning. 20 C.F.R. § 416.926a(a). To determine functional equivalence, the following six
4 broad areas of functioning, or domains, are considered: acquiring and using information, attending and
5 completing tasks, interacting and relating with others, moving about and manipulating objects, caring for
6 self, and health and physical well-being. 20 C.F.R. § 416.926a.

7 **ALJ'S FINDINGS**

8 At step one of the sequential evaluation, the ALJ found plaintiff had not engaged in substantial
9 gainful activity at any time relevant to the decision. (Tr. 21.) At steps two and three, the ALJ found
10 plaintiff has the severe impairments of urinary tract disorder and other disorders of the gastrointestinal
11 system, but these impairments alone or in combination do not meet or medically equal one of the listed
12 impairments in 20 C.F.R., Appendix 1, Subpart P (Listings). (Tr. 21.) Next, the ALJ determined plaintiff
13 does not have any impairment or combination of impairments that functionally equal the listings. (Tr.
14 21.) The ALJ found plaintiff has no limitation in the domains of acquiring and using information (Tr.
15 23), attending and completing tasks (Tr. 24), and moving about and manipulating objects. (Tr. 26.) In
16 the domains of interacting and relating with others and health and physical well-being, the ALJ found
17 plaintiff has a less than marked limitation. (Tr. 25, 28.) The ALJ found plaintiff has a marked limitation
18 only in the domain of caring for self. (Tr. 27-28.) Therefore, the ALJ concluded plaintiff has not been
19 under a disability as defined in the Social Security Act since April 21, 2004, the date the application was
20 filed. (Tr. 29.)

21 **ISSUES**

22 The issue is whether the ALJ's decision is supported by substantial evidence and free of legal
23 error. Specifically, plaintiff argues the ALJ erred by finding she has a less than marked limitation in the
24 domain of health and physical well-being. (Ct. Rec. 18 at 15-19.) Plaintiff also alleges the ALJ failed
25 to develop the record regarding plaintiff's psychological impairment. (Ct. Rec. 18 at 19-21.) Defendant
26 argues substantial evidence supports the ALJ finding in the domain of health and physical well-being.
27 (Ct. Rec. 20 at 6-10.) Defendant also argues the ALJ's duty to develop the record was not triggered
28 because there was no ambiguous credible evidence regarding plaintiff's impairments and the record was

adequate to allow a proper evaluation of the evidence. (Ct. Rec. 20 at 10.) Defendant also argues that new evidence submitted to the Appeals Council is not material and does not provide cause for remand. (Ct. Rec. 20 at 11-14.)

DISCUSSION

Plaintiff argues the ALJ failed to defer to the opinion of Dr. Emmans, plaintiff's treating physician.¹ In a report dated August 17, 2006, Dr. Emmans assessed a less than marked impairment in the domain of health and physical well-being. (Tr. 246.) Dr. Emmans explanation for the assessment states, "However she is frequently ill and is often missing school and having some social hardships second to this." (Tr. 246.) Plaintiff argues Dr. Emmans' explanation matches the definition of a marked impairment and the ALJ should have made such a finding, in spite of the doctor's check mark indicating a less than marked impairment. (Ct. Rec. 18 at 17.) If the ALJ should have interpreted Dr. Emmans' report to assess a marked impairment in the domain of health and physical well-being, plaintiff is disabled because the limitations assessed by Dr. Emmans would be functionally equivalent to a listed impairment.

In assessing a less than marked limitation in the health and physical well-being domain, the ALJ noted plaintiff has "some severe impairments that cause her some limitations, but not to a significant extent." (Tr. 28.) The ALJ also pointed out that the plaintiff is "otherwise healthy and able

¹The ALJ must consider the opinions of acceptable medical sources about the nature and severity of the Plaintiff's impairments and limitations. 20 C.F.R. §§ 404.1527, 416.927; S.S.R. 96-2p; S.S.R. 96-6p. A treating or examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989). In this case, the ALJ did not reject the treating physician's opinion. (Tr. 22-28.)

1 to function normally.” (Tr. 28.) The ALJ acknowledged plaintiff is prone to missing school
2 frequently due to her chronic infections and she suffers some social hardships as a result of her
3 condition, both observations made by Dr. Emmans. (Tr. 28, 244.) However, the ALJ concluded the
4 Dr. Emmans’ check mark next to “less than marked” is consistent with the other evidence of record.
5 In support, the ALJ cited a 2004 functional assessment completed by Dr. Emmans which described
6 plaintiff as normal in every category, including fine and gross motor skills, sensory abilities, speech
7 and communication skills, cognitive skills, behavior and social skills, and emotional development.
8 (Tr. 28, 255.)

9 The regulations define a marked limitation as one in which the impairment interferes seriously
10 with the ability to independently initiate, sustain, or complete activities. 20 C.F.R. §
11 416.926a(e)(2)(I). Day-to-day functioning may be seriously limited when the impairment limits only
12 one activity or when the interactive and cumulative effects of the impairment limit several activities.
13 *Id.* A marked limitation is a limitation that is more than moderate, but less than extreme. *Id.* In the
14 domain of health and physical well-being, a marked limitation may be assessed for frequent illness
15 due to the impairment that results in significant, documented symptoms or signs. 20 C.F.R. §
16 416.926a(e)(2)(iv). “Frequent” means episodes of illness or exacerbations that occur on an average
17 of 3 times each year, or once every 4 months, each lasting 2 weeks or more. *Id.* A marked limitation
18 may be assessed for episodes that occur more often but do not last for 2 weeks, or occur less often but
19 last for longer than two weeks, if the overall effect is equivalent in severity. *Id.*

20 Dr. Emmans’ explanatory comment, “she is frequently ill and is often missing school,”
21 suggests that plaintiff meets the definition of a marked limitation under 20 C.F.R. 416.926(e)(2)(iv.)
22 This conflicts with his assessment of a less than marked limitation, creating an ambiguity in the
23 opinion of the treating physician. Ambiguous evidence triggers the ALJ’s duty to conduct an inquiry.
24 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). When the evidence received from a
25 treating physician is inadequate to determine disability, the ALJ needs additional information to make
26 a determination. 20 C.F.R. 416.912(e). The regulations provide in part:

27 We will seek additional evidence or clarification from your medical source when the
28 report from your medical source contains a conflict or ambiguity that must be
resolved, the report does not contain all the necessary information, or does not appear

1 to be based on medically acceptable clinical and laboratory diagnostic techniques. We
2 may do this by requesting copies of your medical source's records, a new report, or a
3 more detailed report from your medical source, including your treating source, or by
4 telephoning your medical source.

5 20 C.F.R. 416.912(e)(1). When the duty to conduct an appropriate inquiry is triggered, the ALJ may
6 subpoena the physician, submit further questions to the physician, or continue the hearing to augment
7 the record. *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). Here, the ALJ failed to address the
8 apparent conflict between Dr. Emmans' assessment of a less than marked limitation and his
9 explanation suggesting a marked limitation. Furthermore, plaintiff's counsel raised the issue at the
10 hearing (Tr. 484-85), but the ALJ did not discuss the issue. Thus, the ALJ erred.

11 Defendant argues Dr. Emmans' written narrative does not counter his finding of a less than
12 marked limitation. (Ct. Rec. 20 at 9.) Defendant points out the medical report form completed by Dr.
13 Emmans contains the criteria for a marked limitation which mirrors the language of 20 C.F.R. §
14 416.926a. Dr. Emmans' written comment, defendant asserts, must therefore be construed to mean
15 that plaintiff does not have a marked limitation in the domain of health and physical well-being. (Ct.
16 Rec. 20 at 10.) However, the form language stating a child has a marked limitation when he or she is
17 "frequently ill" only emphasizes the ambiguity created by Dr. Emmans' use of the term "frequently
18 ill" in describing a less than marked limitation. While the ALJ is responsible for resolving conflicts
19 in evidence, *Lewis*, 236 F.3d 503, 509 (9th Cir. 2001), and is the final arbiter with respect to
20 ambiguities in the medical evidence, *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008), he
21 did not do so here. The ALJ did not acknowledge or address the ambiguity in Dr. Emmans' opinion
22 or attempt to resolve it; therefore, the ALJ erred.

23 Furthermore, plaintiff submitted a letter from Dr. Emmans dated June 29, 2007 to the Appeals
24 Council. (Tr. 5, 9, 464.) The 2007 Dr. Emmans letter is properly considered by this court because
25 the Appeals Council considered it in denying plaintiff's request for review, *see Harman v. Apfel*, 211
26 F.3d 1172, 1180 (9th Cir. 2000); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993), although
27 evidence obtained after the ALJ has issued an adverse determination is less persuasive. *See Weetman*
28 *v. Sullivan*, 877 F.2d 20, 23 (9th Cir. 1989). In the 2007 letter, Dr. Emmans noted that after reviewing

1 other evidence in the record² he believes that plaintiff actually has a marked limitation in the domain
2 of health and physical well-being. (Tr. 464.) Although the letter was not available to the ALJ for
3 review, it indicates that had the ALJ sought additional evidence, the outcome of the case might have
4 been different. As such, the additional evidence should be considered on remand.

5 Plaintiff also alleges the ALJ erred by failing to develop the record with respect to plaintiff's
6 alleged undiagnosed neuropsychological problems. (Ct. Rec. 18 at 18-21.) Plaintiff's counsel
7 requested an order directing neurological testing at the hearing. (Tr. 485-86.) Although the ALJ
8 mentioned the May 2006 findings of Jo H. Scarber, M.Ed., Ed.S., certified in school psychology
9 which indicated plaintiff should have further evaluation to rule out a medical basis for her academic
10 defects (Tr. 22, 226-27, 239-40) , the ALJ did not analyze or comment on the evidence of an
11 undiagnosed neuropsychological problem. On remand, the ALJ should address the issue
12 neuropsychological problem and, if appropriate, order further testing.

13 CONCLUSION

14 The ALJ's decision is not supported by substantial evidence and free of legal error. A remand
15 for further proceedings is the proper remedy. On remand, the ALJ will conduct a new sequential
16 evaluation. The ALJ should also address the additional evidence made part of the record by the
17 Appeals Council, develop the record further and consider other post-hearing evidence as is
18 appropriate.

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26 ²Dr. Emmans' 2007 letter mentions review of a November 20, 2006 letter from plaintiff's second
27 grade teacher indicating plaintiff has bathroom accidents at least once or twice per week (Tr. 462) and
28 plaintiff's first grade progress report "indicating excessive absences." (Tr. 213, 464.)

1 Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is **GRANTED**. The matter is
4 remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C.
5 405(g).

6 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is **DENIED**.

7 3. An application for attorney fees may be filed by separate motion.

8 The District Court Executive is directed to file this Order and provide a copy to counsel for
9 plaintiff and defendant. Judgment shall be entered for plaintiff and the file shall be **CLOSED**.

10 DATED February 18, 2008.

11 S/ JAMES P. HUTTON
12 UNITED STATES MAGISTRATE JUDGE